Supreme Court, U.S.
FILED
JUL 1 - 2004

No. 04 9

In The Supreme Court of the United States

LAVELLE S. MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL WHEN AN ALTERNATE JUROR WHO HAD BEEN DISMISSED WAS RECALLED AND ALLOWED TO REJOIN THE JURORS WHO HAD ALREADY SELECTED A FOREPERSON?

2. WHETHER A.U.S.A. PROSECUTOR KOSHY VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN RULE 615 OF THE FEDERAL RULES OF EVIDENCE HAD BEEN INVOKED AND HE DISCUSSED THE TESTIMONY OF CERTAIN GOVERNMENT WITNESSES DURING A RECESS IN THE PRESENCE OF A PERSON WHO WAS STILL UNDER OATH AND WHO HAD NOT BEEN EXCUSED FROM THE WITNESS STAND?

3. WHETHER THE COURT ERRED IN DENYING DEFENSE MOTION FOR PROSECUTORIAL MISCONDUCT WHEN A.U.S.A. PROSECUTOR KOSHY KNEW BEFORE SEEKING A SUPERCEDING INDICTMENT THAT A GOVERNMENT WITNESS SHARED THE SAME LAWYER AS THE APPELLANT?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Lavelle Moore, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States District Court, Middle District of Tennessee, Nashville Division, entered on February 15th, 2002, affirming the Defendant's conviction for counts 1 through 14, including felon in possession of a firearm.

OPINION BELOW

The Sixth Circuit Court of Appeals affirmed the decision of the lower court did not select its opinion for publication.

JURISDICTION

The Sixth Circuit filed its decision on April 1, 2004. Petitioner would submit that this Petition for a Writ of Certiorari is timely filed within the ninety day time period permitted by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review the circuit court's decision on a write of certiorari.

CONSTITUTIONAL PROVISIONS AND RULES

U.S. CONST. AMEND VI and FED. R. EVID. 615 are reproduced in the appendix.

STATEMENT OF THE CASE

On September 5, 2001, a Federal Grand Jury returned a one count indictment against Lavelle S. Moore (R. 2, Indictment, pg. 13, Apx. pg. 4).

The indictment charged that on or about August 29, 2001, in the Middle District of Tennessee, the aforesaid defendant, being a person who had previously been convicted of one or more crimes punishable by a term of imprisonment exceeding one year in the State of Tennessee, did unlawfully and knowingly possess, in or affecting commerce, firearms, that is a Taurus .357 caliber revolver and an Intratec TEC-DC9 semi-automatic assault weapon, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

On October 22, 2001, Kenneth Crites, appellant's attorney at the district level, waived appellant's presence and on appellant's behalf, pled not guilty to all counts (R. 33, Waiver, pg. 15, Apx. pg. 61).

On February 14, 2001, appellant was sentenced to 85 years (R. 57, Judgment, pg. 18, Apx. pg. 15).

STATEMENT OF THE FACTS

Trial commenced on November 5, 2001, with a twelve-person jury and two alternates selected and sworn (The Court at TR 5, 24, Apx. pg. 253).

During the course of the trial, A.U.S.A Koshy called witness Ms. Kyndle Crigler in his case in chief (Koshy at TR 316, Apx. pg 330). Ms. Crigler is defendant's former girlfriend and the mother of his child (Crigler at TR 323, Apx. pg. 176). Her first testimony regarding this matter occurred before a Federal Grand Jury during the indictment stage. Her subsequent testimony at the trial was inconsistent with her original Grand Jury testimony. A.U.S.A Koshy stated this inconsistency on the court record (Koshy at TR 371, Apx. pg 260). The Court recessed for the day

and resumed the trial the following morning (The Court at TR 371, Apx. pg. 260).

The next morning the court stated, "We're going to continue with the direct examination of Ms. Crigler. Ms. Crigler, you are still under oath from yesterday" (The Court at TR 378, Apx. pg. 198). After a few more questions from the government, defense counsel began cross-examination by asking whether Ms. Crigler had spoken with anyone in the U.S. Attorney's Office after court had recessed the night before. (Crites at TR 388, Apx. pg. 209). She answered "yes" and indicated that she spoke with A.U.S.A Koshy as follows:

> Crites: Okay. Did you feel threatened or intimidated in any way by that conversation?
>
> Crigler: Yes and no.

(Crites & Crigler at TR 389, Apx. pg. 249). On re-direct, A.U.S.A Koshy addressed that question as follows:

> Koshy: Now, Mr. Crites asked you whether you felt threatened and intimidated by our conversation last night?
>
> Crigler: Yes.
>
> Koshy: What happened is, after the jury broke, we had a few proceedings here in this court; correct?
>
> Crigler: Yes.

Koshy: Okay. And you were asked by someone, other than me, to make sure you had contact with Sumter Camp; correct?

Crigler: Yes.

(Koshy & Crigler at TR 411, Apx. pg. 345). They went to his office and A.U.S.A Koshy called Attorney Sumter Camp at the Federal Public Defender's office and, because he was not in, left a message on his voice mail (Koshy at TR 412, Apx. pg. 208).

Koshy: And I relayed to Mr. Camp on his voice mail what had happened in the court?

Crigler: Yes.

Koshy: What some people had said, some people other than me had said?

Crigler: Yes

(Koshy & Crigler at TR 412, Apx. pg. 208).

The trial continued and on the third day, defense counsel informed the court of a situation that he characterized as a "serious matter" (Crites at TR 431-433, Apx. pg. 218-220). The government intended to call Kirk Campbell, a witness who was being represented by attorney Rayburr McGowan, the same attorney who represented appellant in this matter prior to defense counsel, Mr. Crites (Crites at TR 431, Apx.

pg. 218). Mr. McGowan was Mr. Campbell's attorney on the same matter at the time of trial (Crites at TR 431, Apx. pg. 218). Both appellant and Mr. Campbell had cooperated with the government and provided information on the matter at hand (Crites at TR 432, Apx. pg. 219). Both were represented by Mr. McGowan at the time of proffering that information (Crites at TR 432, Apx. pg. 219).

The trial finally reached an end, closing statements were completed, and on Friday, November 9, 2001, the jury retired to the jury room to select a foreperson (The Court at TR 1086, Apx. pg. 313). The two alternates were excused from the case at that time (The Court at TR 1086, Apx. pg. 313). Deliberations were scheduled to begin the following Tuesday, November 13, 2001, after a three-day, holiday weekend (The Court at TR 1091, Apx. pg 315).

On Tuesday, November 13, 2001, one of the jurors was excused because his mother passed away over the weekend (The Court at TR 1106, Apx. pg. 323). The court discussed recalling one of the two alternate jurors and quickly dismissed alternate number one (The Court at TR 1097, Apx. pg. 245). Alternate number two, Thomas Suren, was recalled and admitted to the court at that time that he had discussed the case since being excused four days earlier (Suren at TR 1101, Apx. pg. 457). The court allowed Mr. Suren to rejoin the eleven remaining jurors against the objection of appellant's counsel (The Court at TR 1102, Apx. pg. 319).

After further discussion, the court decided to re-excuse Mr. Suren and deliberate with only eleven jurors, also against the objection of appellant's counsel

(Crites at TR 1104, Apx. pg. 248 ; The Court at TR 1107, Apx. pg. 324). The eleven person jury returned a verdict of guilty on counts 1 through 14 (The Court at 1116, 1117, Apx. pg. 326).

REASONS FOR ALLOWANCE OF WRIT

1. **WHETHER THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL WHEN AN ALTERNATE JUROR WHO HAD BEEN DISMISSED WAS RECALLED AND ALLOWED TO REJOIN THE JURORS WHO HAD ALREADY SELECTED A FOREPERSON?**

2. **WHETHER A.U.S.A. PROSECUTOR KOSHY VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN RULE 615 OF THE FEDERAL RULES OF EVIDENCE HAD BEEN INVOKED AND HE DISCUSSED THE TESTIMONY OF CERTAIN GOVERNMENT WITNESSES DURING A RECESS IN THE PRESENCE OF A PERSON WHO WAS STILL UNDER OATH AND WHO HAD NOT BEEN EXCUSED FROM THE WITNESS STAND?**

3. **WHETHER THE COURT ERRED IN DENYING DEFENSE MOTION FOR PROSECUTORIAL MISCONDUCT WHEN A.U.S.A. PROSECUTOR KOSHY KNEW BEFORE SEEKING A SUPERCEDING INDICTMENT THAT A GOVERNMENT WITNESS SHARED THE SAME LAWYER AS THE APPELLANT?**

The criminal law must seek to provide effective protection for the public and justice to the accused. Its general principles founding liability must be consistent, clear and comprehensible. To accomplish this goal, we have developed Rules of Criminal Procedure. Appellant, Lavelle S. Moore, was denied a fair trial in this case because the Fundamental Rules of Criminal Procedure, rules which are designed to apply to every person who comes before the bar seeking justice, were not followed by the Court.

1. WHETHER THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL WHEN AN ALTERNATE JUROR WHO HAD BEEN DISMISSED WAS RECALLED AND ALLOWED TO REJOIN THE JURORS WHO HAD ALREADY SELECTED A JURY FOREPERSON?

This Honorable Court has not spoken, however, other Circuits have ruled that it is an error to invite alternates who have been dismissed back to join a jury which has already begun the process of deliberation. In the instant case, both alternate jurors were dismissed at the conclusion of the jury instructions following the proof in the trial (The Court at TR 1086, Apx. pg. 313). Then the Court learned of the death of a juror's mother which occurred over the weekend, and decided to call back one of the alternate jurors. Having decided to pass over the first alternate juror because of a question that she posed during the trial, the Court recalled the second alternate juror (The Court at TR 1101, Apx. pg. 318). Mr. Suren came back to Court and was asked by the Honorable Judge Trauger whether he had discussed the case with anyone (The Court at TR 1101,

Apx. pg 318). He answered, "I spoke with my wife about the case" (Suren at TR 1101, Apx. pg. 318). The wife, who was not present, was not able to be questioned by the Court. The Court then allowed Mr. Suren to rejoin his fellow jurors and retrieve his note pad, which he had left in the courtroom at the conclusion of the proof and charge.

What was discussed behind closed doors when Mr. Suren assumed the role of twelfth juror is unknown. What influence or contamination he might have had on the other eleven jurors is a matter for speculation. Whether the conversation he had with his wife caused him to form an opinion is unclear. However, the rule of law is very clear. It is an error to contaminate a jury with outside influences. In fairness to the Court, Judge Trauger realized this and re-excused Mr. Suren from jury duty (The Court at TR 1107, Apx. pg. 324). However, this was after he had already rejoined his fellow jurors and retrieved his trial notes. Granted, Judge Trauger decided to dismiss Mr. Suren in light of the fact that "two or three other Circuits [had] spoken [on this exact issue] and said that once the alternates have been discharged, it would be error to bring them back" (The Court at TR 1104, Apx. pg. 321). However, she failed to see that the contamination or potential tainting of the jury had already taken place.

These same circuit courts that had encountered this issue before were consistent in declaring a mistrial due to the likelihood of an unfair verdict. The District Court in this case, however, ignored the policy behind those decisions. Judge Trauger even went on to say, "I think our safest course of action is to proceed with

eleven jurors under the rules. And Mr. Crites (defense counsel), I presume you are going to object to that?" (The Court at 1104, Apx. pg. 321) Mr. Crites did, in fact, object and rightly so. Even if this court feels that a jury of eleven can constitutionally safeguard the rights of a defendant in a criminal case, the matter at hand introduces a more specific issue: whether those eleven jurors can manufacture a fair verdict after being tainted by the return of an excused juror and his subsequent discussions outside the confines of the jury deliberation process. This issue should have been addressed by the Court and a mistrial declared sua sponte.

2. **WHETHER A.U.S.A KOSHY VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN RULE 615 OF THE FEDERAL RULES OF EVIDENCE HAD BEEN INVOKED AND HE DISCUSSED THE TESTIMONY OF CERTAIN GOVERNMENT WITNESSES DURING A RECESS IN THE PRESENCE OF A PERSON WHO WAS STILL UNDER OATH AND WHO HAD NOT BEEN EXCUSED FROM THE WITNESS STAND?**

At the commencement of the trial the Court invoked the Rule 615 by asking witnesses to leave the courtroom with the admonition, "Do not discuss your testimony after you have testified with witnesses who have not testified." (The Court at TR 32, 33, Apx. pg. 256). Rule 615 or the "Rule", as it is often referred to, states that "...at the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses."

In the Advisory Committee Notes, the purpose of the rule is explained: the efficacy of excluding, or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion.

Whatever was said about the trial proceedings by A.U.S.A Koshy to a voice mail in the presence of the witness violated Federal Rule of Evidence 615. The discussion in the presence of the witness in such a manner as to evoke a response such as Ms. Crigler gave is unfair to the defendant and inappropriate in a court of law.

3. WHETHER THE COURT ERRED IN DENYING DEFENSE MOTION FOR PROSECUTORIAL MISCONDUCT WHEN A.U.S.A. PROSECUTOR KOSHY KNEW BEFORE SEEKING A SUPERCEDING INDICTMENT THAT A GOVERNMENT WITNESS SHARED THE SAME LAWYER AS THE DEFENDANT?

The main issue is *not* conflict of interest as analyzed in the unreported decision of McNeal vs. United States, April 11, 2001 (Westlaw 391980) and cited by the Court in the instant case (The Court at TR 844, Apx. pg 293). The real issue is what information, if any, did government witness Campbell and his attorney, Mr. McGowan, give A.U.S.A Koshy that he could use to obtain an indictment or superceding indictment against appellant.

After learning that appellant's previous attorney may have placed appellant in jeopardy, defense counsel immediately objected and motioned for prosecutorial

misconduct accordingly (Crites at TR 431, 628, Apx. pg. 218). A.U.S.A. Koshy had knowledge of this conflict as early as September 17th, 2001, and failed to inform defense counsel until Friday, November 2, 2001, the night before trial (Crites at TR 431, Apx. pg. 218; Tr. T. Vol. III. p.628). The Court invited briefs on the motion which were duly filed. (Crites at TR 823, Apx. pg. 239).

According to Attorney McGowan, he knew of the conflict on September 27th, 2001. (McGowan at TR 688, Apx. pg. 360). If this is true, he should have informed his successor, Mr. Crites, who had been retained to represent defendant on September 10th, 2001. A.U.S.A. Koshy claims that he knew of the conflict as of September 17th, 2001, yet he too failed to inform defense counsel, Mr. Crites, until the night before trial. A.U.S.A. Koshy acknowledges that McGowan and his client, Mr. Campbell, knew about defendant Moore because he admits that he telephoned Mr. McGowan and they discussed the matter (Koshy at TR 994, Apx. pg. 342).

What they discussed is of critical importance to the case before this court. Campbell admits that although he does not remember when the conversation took place, Mr. McGowan told him that some type of Federal indictment "was coming... [his] way" (Campbell TR 703, Apx. pg. 138). This might lead a person to believe that McGowan had already represented to A.U.S.A. Koshy Mr. Campbell's willingness to testify against Moore in return for keeping Campbell's case in the State Court system. This would avoid making Campbell a co-defendant of Moore's and further compounding the conflict issue, which was now apparent to both McGowan and Koshy.

Since A.U.S.A Koshy was not questioned under oath, Mr. Campbell refused to waive his Attorney-Client privileges (Campbell at TR 825, Apx. pg. 140). Special Agent Conner did not testify so the facts the Court received could never be corroborated and the ends of justice have simply not been met. The gravity of such a course of action cannot be over-emphasized, particularly when the United States had over three weeks to reflect on the now obvious conflict that McGowan's dual representation had caused before going in front of the Grand Jury to seek a substantial superceding indictment.

It is worth noting that until the matter was raised by the defense counsel, A.U.S.A Koshy had not informed the Court at any time of his earlier discovery that Mr. Campbell, his witness, and the Defendant had shared the same lawyer.

Although the motion for prosecutorial misconduct was denied, the trial Court never directly addressed that charge. Instead, the Court found that there was clearly an ethical violation in that Attorney McGowan had represented Campbell in his state case while at the same time representing Moore in his federal case.(The Court at TR 843, Apx. pg. 292). The Court recognized that A.U.S.A Koshy should have suggested to Mr. McGowan that he find other counsel for Mr. Moore since he knew that an ethical violation had taken place. However, the Court did not question him under oath, as to his knowledge of the matter even though it contemplated that very scenario at the outset of the trial by stating, "You may even have to testify" (The Court at TR 614, Apx. pg. 264).

Any analysis of prosecutorial misconduct must turn on what the Prosecutor knew and when he obtained that knowledge. In this case, the Court failed to ask the Prosecutor whether the information received from either Attorney McGowan or Mr. Campbell was used to obtain the superceding indictment against Appellant Moore. The Trial Court should have conducted a thorough investigation and since A.U.S.A. Koshy was the central figure, he should have been subject to examination by the Court. Instead, the Court agreed with A.U.S.A Koshy that this was the defense's burden. (Koshy & The Court at TR 622, Apx. pg. 266).

The Court asked defense counsel to articulate his motion again. One of the allegations raised by the defense was prosecutorial misconduct (Crites at TR 623, Apx. pg. 235). Defense made the same motion again (Crites at TR 628, Apx. pg. 237). The Court should have proceeded by putting A.U.S.A Koshy under oath instead of treating him as an officer of the Court. Under oath, Mr. Crites would have been able to examine him as a witness.

However, the Court did ask A.U.S.A. the seminal question. The court asked, "What did you use to form the basis for the superceding indictment?" A.U.S.A Koshy answered, "Special Agent Conner testified and summarized the investigation" (The Court & Koshy at TR 629, Apx. pg. 340). This was a vague, misleading and evasive answer. It should have been followed up in order to learn what Conner testified to before the Grand Jury on October 10, 2001, and more importantly, where the information he had imparted to the Grand Jury had come from to obtain the superceding indictment (Koshy at TR 631, Apx. pg.

341). The Court's inquiry centered on whether Defendant Moore gave Attorney McGowan any information which was not included in his proffer to A.U.S.A Koshy or Special Agent Conner.

Defendant Moore recalled telling McGowan who his suppliers of drugs were, including Kirk Campbell, a fact that was denied by McGowan. The only person who could have testified as to whether the Government obtained information from McGowan, which was used to seek a superceding indictment against Defendant Moore, was A.U.S.A Koshy. The Court was effectively distracted by the apparent attorney-client conflict of interest and the real issue of prosecutorial misconduct was lost in an ethical fog.

CONCLUSION

Petitioner, Lavelle S. Moore, respectfully requests that this Court grant the *Petition for a Writ of Certiorari*, and reverse the decision of the Sixth Circuit Court of Appeals and such other relief as the Court deems proper.

Respectfully submitted,
Lavelle S. Moore

BY: /s/ Charles E. Waldman

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NOT FOR PUBLICATION
No. 02-5639

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff – Appellee,	))
v.	)
LAVELLE MOORE Defendant – Appellant.	))

OPINION
[Entered April 1, 2004]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: SUHRHEINRICH and CLAY, Circuit Judges; and GWIN, District Judge*

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

GWIN, District Judge.

After a jury found appellant Lavelle Moore guilty of sixteen counts of drug, money laundering, and firearm violations in the Middle District of Tennessee, the district court sentenced Moore to eighty-five years imprisonment. With this appeal of right, Moore raises various claims of error. For the reasons that follow, we find none of his claims persuasive and AFFIRM the judgment of the district court.

I. BACKGROUND

Appellant Moore came to the attention of federal officials during an investigation of drug trafficking and money laundering involving marijuana shipped from Los Angeles, California to Nashville and Memphis, Tennessee. On August 29, 2001, Moore's girlfriend Audrea Pipkin contacted the local police to report a domestic altercation between herself and Moore. As luck would have it, an Internal Revenue Service agent happened to be driving to Moore's home to serve Moore with a grand jury subpoena at the time police officers responded to the domestic dispute. The IRS was investigating fraudulent paperwork regarding the purchase of a Lexus automobile. The IRS believed Moore had purchased the automobile with drug sale proceeds.

After the police officers and the IRS agent arrived at Moore's home, Moore acknowledged to them that the Lexus, although titled in the name of his ex-girlfriend Kyndle Crigler, belonged to him. The police searched the vehicle and found a revolver and a semiautomatic assault weapon. On September 5, 2001, a federal grand jury returned a one-count indictment

chagrining Moore with being a felon in possession of an assault weapon. The police arrested Moore the following day.

As we will discuss, Moore's appeal raises issues regarding whether his initial attorney had a conflict of interest. At Moore's initial court appearance, a magistrate judge appointed attorney Rayburn McGowan to represent Moore. On September 10, 2001, Moore waived his right to a detention hearing while represented by attorney McGowan. After this September 10, 2001, proceeding, McGowan ceased representation of Moore and attorney Kenneth Crites began representing Moore.[1]

Realizing that a superseding federal indictment involving drug charges was imminent, Moore gave a proffer statement to the Government on September 20, 2001. With attorney Crites present, Moore's statement provided details of his drug connections.[2] The Government, however, declined to use Moore as a witness. Having obtained the name of drug dealer Kirk Campbell from Moore, the Government contacted Campbell. Campbell was awaiting trial on state drug-related charges. Attorney McGowan, Moore's prior attorney, represented Campbell in the state proceedings. Apparently, neither attorney McGowan nor Assistant United States Attorney Koshy thought that this situation

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[1] Attorney McGowan filed a motion to withdraw as counsel on September 25, 2001. The court granted the motion on September 26, 2001.

[2] Attorney McGowan also appeared at this meeting. After Crites advised him that he would be representing Moore, McGowan left.

demanded Campbell secure a new counsel before speaking to the Government. After a discussion with law enforcement agents, Campbell agreed to cooperate with the federal Government and to testify against Moore at trial. The Government subsequently sought a superseding indictment against Moore that included drug and money laundering charges. On October 10, 2001, a federal grand jury returned a sixteen-count superseding indictment against Moore.[3]

With this factual background, we move on to consider the trial and the issues that are the subject of this appeal. The case went to trial on November 5, 2001, with a twelve-person jury and two alternates. During the first day of testimony, the Government called Moore's ex-girlfriend, Kyndle Crigler. With his appeal, Moore argues that the Government violated the trial court's order for the sequestration of witnesses when the Government discussed statements made during the trial before ex-girlfriend Crigler. Specifically, Moore says the Government discussed testimony of other witnesses in the presence of witness Crigler during a break in her testimony.

During its direct examination of girlfriend Crigler, the Government indicated that Crigler's testimony differed from her grand jury testimony.

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[3] This indictment charged Moore with conspiracy to distribute and possess with intent to distribute marijuana, maintaining places for the purpose of distributing and using marijuana, possession with intent to distribute and distribution of marijuana, using and carrying firearms during and in relation to drug trafficking offenses, conspiracy to commit money laundering, being a felon in possession of firearms, and money laundering. The indictment also included two forfeiture counts.

During Crigler's testimony, the court recessed the trial. During that recess, the Assistant U.S. Attorney called Crigler's attorney to complain in a voice mail that she was backing away from her earlier testimony. Crigler was present during the phone call. In the conversation with Crigler's attorney, the Assistant U.S. Attorney relayed "what some people had said, some people other than me had said" the previous day. The record does not clarify what statements the Assistant U.S. Attorney described to Crigler's attorney while Crigler was present to hear. Moore complains that the Assistant U.S. Attorney violated the sequestration of witness order by discussing other witnesses's testimony in Crigler's presence.

Moore also says the trial court erred in allowing testimony from Kirk Campbell whom Moore's former attorney represented. On the third day of trial, defense attorney Crites informed the court of a "serious matter." Attorney Crites explained that the Government intended to call Kirk Campbell, a witness whom Moore's former attorney McGowan now represented. Because attorney McGowan had earlier represented appellant Moore in the case, attorney Crites contended that calling Campbell was prosecutorial misconduct and a violation of Moore's attorney-client privilege. Expressing dismay that the parties had not alerted the court earlier,[4] the court ordered Moore to file a motion outlining his position.

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[4] Defense attorney Crites was aware that the Government planned to use Kirk Campbell as a witness since the Friday before the trial. The Government had been aware as early as September 17, 2001.

With that subsequently filed motion, appellant Moore moved for a new trial or alternatively to strike the testimony of witness Campbell. Responding, the Government asserted that Campbell's testimony was integral to its case. After receiving these positions, the court held an evidentiary hearing. During this hearing, attorney McGowan, appellant Moore, and witness Campbell testified. Defense counsel Crites did not call Assistant U.S. Attorney Koshy to the stand. At the hearing's conclusion, the district court found that while an ethical violation likely occurred, appellant Moore had not shown any evidence of prejudice. In fact, Moore was unable to show any facts that McGowan might have shared with the Government that Moore himself had not already provided the Government during an earlier proffer session. The court denied appellant Moore's motion to dismiss or alternatively exclude the testimony of Kirk Campbell. Subsequently, witness Campbell testified against Moore at trial.

For his third argument of error, Moore says the trial court erred to his prejudice regarding the seating of an alternate juror. On November 9, 2001, the parties concluded the presentation of evidence and made closing arguments. The trial had lasted five days and involved twenty-three witnesses. At the trial's conclusion, the court instructed the jury and discharged the alternate jurors. Because it was late in the day, the court asked the jurors to select a foreperson but recommended they wait to begin deliberations until after the holiday weekend. The jury entered the jury room and chose a foreperson. The jury then informed the court that they would begin deliberations after the three-day weekend.

When the jurors returned to deliberate the following Tuesday, the court received a juror's request to be excused. In describing his reason for seeking to be excused, the juror said his mother had died over the weekend, and he needed to travel the following day for the funeral. Since the jurors had not yet deliberated, the court announced its plan to call back one of the two alternates. Initially, defense counsel agreed with the plan to seat a dismissed alternate on the jury. After the Government complained about the unsuitability of the first alternate as a juror, the court decided to recall alternate number two.[5] Only after the trial court seated alternate number two with the other jurors in the jury lounge did defense attorney Crites object to the plan to recall a juror. While the court researched the law, the recalled alternate juror waited in the jury assembly lounge with the remaining eleven jurors. The court had earlier ordered the jurors, including the alternate juror, not to discuss the case in the jury lounge. After researching the law, the court discharged the recalled alternate juror and ordered the jury to deliberate with eleven jurors. The eleven-member jury subsequently returned a guilty verdict on all counts of the indictment.

With his appeal, Moore argues that three errors in the trial proceedings resulted in "plain error" so that we must give him a new trial. First, Moore argues it was plain error to allow an alternate juror whom the

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[5] At one point during the trial, the first alternate had written a note to the judge expressing concern that the Government was holding something over ex-girlfriend Crigler that influenced her testimony in favor of the Government. Although the court found this to be a misinterpretation by the alternate, the Government expressed concern that she would not be able to be impartial. The court agreed.

court had dismissed to be recalled. Second, Moore contends that prosecutor Koshy violated his right to a fair trial when he discussed the testimony "of certain government witnesses" in the presence of a government witness whom the trial court had not excused from the witness stand. Third, Moore asserts that it was plain error to deny a defense objection of prosecutorial misconduct when prosecutor Koshy knew before seeking a superseding indictment that the same lawyer had represented a government witness and Moore during part of the case. After considering each argument in turn, we find them to be without merit and AFFIRM the district court's conviction.

II. ANALYSIS

The parties agree that we are to review appellant Moore's claims only for plain error. Fed.R.Crim.P. 52(b); *see United States v. Olano*, 507 U.S. 725, 730-31, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Under the plain error standard, an appellate court will correct an error only if the error (1) is plain, (2) affects substantial rights, and (3) seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Cotton*, 535 U.S. 625, 632, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) (citing *Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). The defendant bears the burden of persuasion under Rule 52(b). *Olano*, 507 U.S. at 741, 113 S.Ct. 1770.

A. Recalled Alternate Juror

Moore argues that the trial court committed plain error when the trial court recalled and allowed an alternate juror to rejoin the other jurors who had already selected a foreperson. The Government contends that Moore "forfeited" this claim. [6] Additionally, the Government argues that Moore shows no prejudice from any error in recalling the discharged juror. [7]

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[6] Although using the term "forfeited," the Government appears to be arguing that Moore "waived" this claim. In *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the Supreme Court distinguished between a waiver and forfeiture of a claim by a criminal defendant. A forfeiture occurs when a defendant fails to timely assert a right. Federal Rule of Criminal Procedure 52(b) governs forfeited claims by reviewing them under the plain error standard. The parties apparently agree that Moore forfeited his claim since Moore concedes that the plain error standard applies. However, a defendant may also waive an error by intentionally relinquishing or abandoning a known right. *Olano*, 507 U.S. at 733, 113 S.Ct. 1770. Waiver, unlike mere forfeiture, extinguishes a defendant's ability to raise the claim at all. This circuit has concluded that the right not to have alternate jurors sit with the jury after deliberations have started may be waived by a defendant. *United States v. Cencer*, 90 F.3d 1103, 1108-09 (6th Cir.1996) (finding substitution provisions of Rule 24(c) to be waivable); *see also United States v. Davis*, 608 F.2d 698, 699 (6th Cir. 1979).

[7] At some length, the Government also argues that the district court acted properly in allowing an eleven-member jury. This argument addresses an issue not raised by appellant on appeal. Even if appellant Moore had made the argument, Federal Rule of Criminal Procedure 23(b) gives district courts discretion to proceed with eleven jurors when excusing a juror is necessary after the jury has retired. *See United States v. Glover*, 21 F.3d 133 (6th Cir.1994).

Federal Rule of Criminal Procedure 24(c) provides:

> Alternate jurors replace jurors in the same sequence in which the alternates were selected ... The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged.

The rule does not allow for alternate jurors to be recalled after being discharged. A court has discretion to retain alternate jurors when the jury retires to deliberate, but only if it does not discharge them and ensures that they do not discuss the case with anyone else. *See United States v. Huntress*, 956 F.2d 1309, 1314-17 (5th Cir.1992), *cert. denied*, 508 U.S. 905, 113 S.Ct. 2330, 124 L.Ed.2d 243 (1993); *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.1985), *cert. denied*, 471 U.S. 1055, 105 S.Ct. 2117, 85 L.Ed.2d 481 (1985). In recalling the discharged juror here, the district court deviated from Rule 24(c).

The Government, however, argues that Moore waived this claim of error. After the district court excused a seated juror because of a death in his family, the court explained its plan to recall a dismissed juror. J.A. at 221. When the court decided to skip over alternate juror one, defense counsel objected. However, the objection complained about skipping over the first alternate. The objection did not complain generally about seating an alternate juror whom the trial court had excused. The court explained that it would call alternate two and then proceeded to do so. J.A. at 223. After the trial court had recalled and seated alternate

juror two with the other jurors in the jury lounge, defense counsel Crites objected to the recall of any discharged jurors. J.A. at 224. Never did the court ask if Moore agreed to waive his right to not have a discharged juror called.

The Government contends that appellant Moore waived this claim by arguing for the substitution of the juror with alternate number one. Even if this alone were sufficient for a waiver of Rule 24(c), Moore subsequently withdrew his consent to seating an alternate whom the trial court had excused. *See United States v. Cencer*, 90 F.3d, 1103, 1109 (6th Cir.1996) (noting that if satisfactory procedures for substituting an alternate are not devised, a defendant "may certainly be permitted to withdraw his consent before it is too late"). Thus, we cannot conclude that Moore waived this claim of error.

Although we find the trial court erred in recalling a discharged alternate juror, we find it made no difference. Appellant Moore does not show that the district court's decision was so prejudicial as to affect his substantial rights. *See* Fed.R.Crim.P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); *Olano*, 507 U.S. at 733-34, 113 S.Ct. 1770.[8] As previously noted, the district court deviated from Rule 24(c) when it ordered the recall of a discharged juror.

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[8] Although the parties suggest that all claims should be reviewed under the plain error standard, this claim arguably is more appropriately analyzed for harmless error under Rule 52(a) since appellant Moore raised the error before the trial court. Regardless, the claim fails even under the more generous harmless error standard.

Moore, however, has not shown how this error affected his substantial rights. Before recalling the alternate juror, the district court questioned the juror on the extent of his communications with others after being discharged. The juror responded that he had not spoken to anyone other than his wife about the trial. When speaking to his wife, the juror merely informed her that the trial involved drugs, guns, and money laundering charges.[9] In such a case, appellant Moore does not show prejudice from the court's error in recalling the discharged juror. *See United States v. Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir.1992) (while the better practice is to go on with eleven jurors, no

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The Court:	... let me ask you-you were dismissed from the jury on Friday. Let me ask you, have you discussed this case with anyone after you were dismissed from the jury?
Mr. Suren:	Your Honor, I spoke with my wife and I told her about the case in the sense that I said it was about drugs, guns, and money laundering. That was the extent of my conversation, and that's all I said to her.
The Court:	Okay. You haven't discussed it with anyone else? Mr. Suren: I have not discussed it with anyone else, Your Honor.
The Court:	Have you read anything about it or seen anything about it on the media or anything of that nature?
Mr. Suren:	No, Your Honor.

J.A. at 296.

prejudice resulted when district court instructed the alternate juror not to discuss case upon being discharged and alternate confirmed she had not when recalled); *United States v. Guevara,* 823 F.2d 446, 448 (11th Cir.1987) (affirming substitution of alternate juror after deliberations began because district court questioned alternate to learn if juror had discussed case with anyone); *United States v. Hillard,* 701 F.2d 1052, 1058 (2d Cir.1983) (allowing juror substitution where district court interviewed alternate to decide whether alternate could deliberate fully and fairly).

More importantly, the recalled juror never deliberated with the other jurors. Although he had contact with the other jurors in the jury lounge, the district court had ordered that the jurors not begin deliberating. The district court excused the alternate before deliberations began. Courts should assume that jurors follow such instructions. *See Francis v. Franklin,* 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). Since appellant Moore presents no evidence that the jurors did not follow the court's instructions, we presume that no deliberations occurred in the jury lounge while in the presence of the recalled alternate. Absent such deliberations, the recalled alternate juror could in no way taint the deliberative process of the other jurors. Considering these facts, we find no possibility that the error of recalling the discharged juror prejudiced Moore. The court's failure to follow the letter of Rule 24(c) is therefore harmless error.

B. Sequestration Order Violation

Moore next argues that the Assistant U.S. Attorney violated his Sixth Amendment right to a fair trial when the prosecutor "discussed the testimony of certain government witnesses" in the presence of a witness scheduled to be recalled, violating the court's sequestration order. We find that Moore has offered no evidence that the Government's attorney violated the court's sequestration order.

Federal Rule of Evidence 615 states that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." The reach of this rule is an unresolved matter. We recently observed that circuits disagree about whether Rule 615 extends beyond the courtroom to permit a court to preclude out-of-court communication between witnesses about the case during trial. *United States v. Solorio,* 337 F.3d 580, 592 (6th Cir.2003), *cert. denied,* --- U.S. ----, 124 S.Ct. 850, 157 L.Ed.2d 723 (2003). As in *Solorio,* we need not today resolve the issue of the scope of Rule 615. Even assuming that the rule extends outside the courtroom, we conclude that Moore simply has not met his burden of showing any evidence of a Rule 615 violation.

Here, the district court invoked Rule 615 before opening statements. On the second day of trial, Moore's ex-girlfriend Kyndle Crigler testified. After releasing the jury for the day, the district judge commented that Crigler was changing her testimony

from her prior grand jury testimony.[10] The following day, ex-girlfriend Crigler continued her testimony. During cross-examination, defense attorney Crites questioned Crigler in the following exchange:

> Q. Ms. Crigler, you had-subsequent to your testimony yesterday, did you have a conversation with anyone in the U.S. Attorney's office?
> A. Yesterday?
> Q. Yesterday evening after you testified.
> A. Yes.
> Q. Now, did--did Mr. Koshy talk to you?
> A. Yes.

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> The Court: ....This witness obviously is backing up on testimony, and Mr. Koshy is surprised by her testimony. And so I would like you, for the record, to clarify a little more what your objection is.
> Mr. Crites: Okay, I will, Your Honor. I think it is improper examination ...
> The Court: You may be under state practice rules. The federal rules are pretty clear that you can impeach your own witness if you need to. And as I say, my perception is that we have a witness who has backed up on her grand jury testimony, and the person who put her on is surprised. Her lawyer is not here, unfortunately.

J.A. 236-37.

Q. Okay. Did you feel threatened or intimidated in any way by that conversation.
A. Yes and no.
Q. Did it cause you to reevaluate your testimony in any way?
A. No.

J.A. at 177-78.

On redirect, Assistant U.S. Attorney Koshy clarified the conversation that had taken place in the following exchange:

Q. And I relayed to Mr. Camp [Krigler's attorney] on his voice mail what had happened in the court?
A. Yes.
Q. What some people had said, some people other than me had said?
A. Yes.
Q. And did I relay all that accurately to Mr. Camp?
A. Yes

J.A. at 180.

Defense attorney Crites further cross-examined ex-girlfriend Crigler after this exchange. However, he did not ask any questions about a sequestration violation and did not move to strike Crigler's testimony. J.A. at 189. For the first time on appeal, Moore suggests that prosecutor Koshy violated Rule 615 by leaving the voice mail message. The Government, however, sets forth the reasonable explanation that the prosecutor was referring to the comments by the district judge made in

front of Crigler. The appellant presents no evidence to support a different conclusion. Appellant Moore has failed to point to anything in the record that shows that "some people" referred to the other witnesses in the case. Without any evidence to suggest a Rule 615 violation, we find the claim fails.[11]

C. Prosecutorial Misconduct in Seeking the Superseding Indictment

In his final claim, Moore argues that Assistant U.S. Attorney Koshy committed misconduct when he sought a superseding indictment based on information provided by a witness represented by attorney McGowan. Defense attorney McGowan represented Moore at his detention hearing before Moore retained attorney Crites. During that representation, attorney McGowan and Moore met twice for about fifteen or twenty minutes each time. While representing Moore, attorney McGowan also represented Kirk Campbell, an individual charged with drug-related offenses in state court. Before the Government sought a superseding indictment against Moore, Campbell gave a proffer to the Government.

With this assignment of error, Moore speculates that attorney McGowan may have given Campbell information that led to the Government seeking a superseding indictment against Moore. Further, Moore states that the prosecutor knew of the conflict but failed to inform Moore's defense counsel Crites until the Friday before trial.

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[11] Moreover, the Government points out that commonsense belies Defendant's claim. If "some people" referred to other witnesses, ex-girlfriend Crigler would not have heard the testimony and would not have been able to testify that Assistant U.S. Attorney Koshy accurately reported the testimony on her attorney's voice mail.

On the third day of trial, defense attorney Crites moved to dismiss the entire case based on prosecutorial misconduct associated with this conflict. The district court held an evidentiary hearing on the motion. At this hearing, defense attorney McGowan, witness Campbell, and appellant Moore each testified. During this hearing, attorney McGowan denied that appellant Moore had even mentioned witness Campbell during their conversations. J.A. at 339. As described above, appellant Moore had given a statement to law enforcement. Moore admitted that he did not give attorney McGowan any information that he had not also given to the Government during his proffer and interview at jail.[12] Witness Campbell stated that the information he provided in his proffer to the Government came solely from him. J.A. at 120. Since

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> Q. Did you tell Mr. McGowan anything about any incriminating thing that you did that you did not tell the government when you gave the proffer statement when Mr. Crites was representing you?
> A. I can't think of anything right now ...
> Q. My question is, what proof do you have that he leaked any information, anything you told him in confidence, that he told it to Kirk, or he told it to me, if he wasn't supposed to?
> A. What proof do we-what do we have that he didn't?
> Q. So is your answer that you have no proof?
> A. No.
> Q. That's not your answer?
> A. I said, what proof do we have that he didn't say it? That's all I've got to say.

J.A. at 392-94.

appellant Moore could not show any prejudice from attorney McGowan's or prosecutor Koshy's conduct, the district court denied the motion.

We review claims of prosecutorial misconduct *de novo* as mixed questions of law and fact. *United States v. Francis,* 170 F.3d 546, 549 (6th Cir.1999). In determining whether prosecutorial misconduct has occurred, we examine whether the prosecutor acted so egregiously as to warrant a court's sanctioning the behavior through a dismissal of the indictment or striking of the testimony of an important government witness.[13] *Cf. United States v. Green,* 305 F.3d 422, 429 (6th Cir.2002). Although the less-than-exemplary conduct of the Government may disturb a court, it does not warrant a dismissal in the circumstances of this case. *See United States v. Simpson,* 927 F.2d 1088, 1091 (9th Cir.1991) (noting that the judicial supervisory power of the actions of prosecutors outside the courtroom is very limited).

Like the district court, we express concern that the prosecutor did not recognize a potential for trouble associated with using the testimony of witness Campbell when witness Campbell's counsel had previously represented appellant Moore. J.A. at 274. However, Moore has not shown that the prosecutor's conduct prejudiced him. Without a showing of prejudice, we do not find the prosecutor's actions warrant the judicial remedy sought by Moore.

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[13] The district court questioned the Government about the necessity of witness Campbell's testimony. The Government indicated that the testimony was integral to its case.

III. CONCLUSION

For the forgoing reasons, we AFFIRM appellant Moore's conviction.

SUHRHEINRICH, Circuit Judge, concurring.

I concur for the most part in the majority's opinion. However, I disagree with the majority's intimations that the prosecutor's behavior here was in any way improper.

I.

Lavelle Moore was indicted by a grand jury on September 5, 2001, and was arrested shortly thereafter. Prior to the indictment on September 4, 2001, Moore had appeared at the local jail, unrepresented, and had given a statement under *Miranda* waiver. On September 6, 2001, the court appointed Attorney McGowan to represent Moore. McGowan appeared with Moore at the initial hearing, held on September 6, 2001. A detention hearing was set for September 10, 2001. On that date, McGowan again appeared with Moore and indicated that Moore waived his detention hearing at that time.

On September 20, 2001, Moore appeared for a detention hearing and arraignment. He was represented at these proceedings by Attorney Crites, who had been retained by Moore's family. At the arraignment, McGowan orally requested permission to withdraw as appointed counsel and departed. He filed a formal motion on September 25, 2001, which was granted by the Magistrate Judge. Also on September 20, 2001, Moore gave a proffer. By the terms of the

agreement, made in conjunction with the proffer, Moore waived his protection under the Rules of Evidence for statements made in the course of plea discussions. In addition, although the Government was not allowed to use Moore's direct words, the agreement allowed the Government to make derivative use of the information provided by the defendant.

The Government obtained a sixteen-count superseding indictment against Moore on October 10, 2001. Moore entered a plea of not guilty on October 19, 2001. On November 2, 2001, the prosecutor forwarded to Crites information that included the fact that McGowan, Moore's former counsel, represented Kirk Campbell, a potential witness. The case went to trial on November 5, 2001. On the third day of trial, Crites raised issues of breach of attorney/ client privilege, ineffective assistance of counsel, and prosecutorial misconduct on the basis of McGowan's former representation of Moore and current representation of Campbell in the proceeding. Crites sought a dismissal of the superseding indictment, or in the alternative the exclusion of Campbell's testimony.

The court held an evidentiary hearing to determine whether there was a conflict or prosecutorial misconduct due to McGowan's prior representation of Moore. Moore, Campbell, and McGowan all testified at the hearing. Although the prosecutor was put on notice that he might also have to testify, he was not, ultimately, required to testify at the hearing. Moore testified first. He stated that he had consulted with McGowan concerning the charges of the instant action on two occasions for approximately fifteen to twenty minutes each. Moore also testified that he had imparted

substantial information regarding his drug suppliers to McGowan, including information concerning Campbell. In addition, Moore testified that he told McGowan that he and Campbell were not very friendly. On cross examination Moore admitted that he did not tell McGowan anything that he did not independently tell the Government in his *Mirandized* statement or his proffer. He further admitted that he had no proof that McGowan had leaked any information to Campbell.

McGowan testified after Moore. He stated that, at the time of his appointment to represent Moore, he was unaware of a conflict of interest due to his representation of Campbell. McGowan testified that his representation of Moore was limited to two meetings. He testified that he did not have any detailed discussions with Moore about the quantity of drugs involved. He further stated that Campbell's name was never mentioned in any of his discussions with Moore. According to McGowan, he first learned that Campbell, who he represented in a state action, was involved in Moore's case approximately one week after his representation of Moore terminated. McGowan testified that he was informed of the potential conflict when the prosecutor called to inform him of Campbell's involvement in Moore's case. He indicated that the prosecutor did not question him about his representation of Moore. McGowan stated that he considered withdrawing as Campbell's counsel, but after carefully considering the issue, he did not see how there would be a conflict. He further testified that he did not provide Campbell with any information he received from Moore and that his prior representation of Moore did not affect his representation of Campbell in anyway.

Campbell testified as well. He stated that he was not influenced in any way by the fact that McGowan had previously represented Moore. He further stated that all of the information contained in his proffer was from personal knowledge and was not obtained from McGowan.

In response to questions from the court, the prosecutor stated that it was his understanding that McGowan did not gain any confidences from Moore. He also stated that he had asked McGowan whether he thought there was any conflict, and McGowan did not.

Following the evidentiary hearing, the court ruled that, although it might have been an ethical violation for McGowan to continue his representation of Campbell in the Moore case, Moore could not show any prejudice because he did not allege any fact that he had told McGowan that he had not independently relayed to the government in his confession or proffer. More importantly, the court found that there was no evidence that McGowan failed to preserve the confidences of Moore. Furthermore, the court found, based on testimony, that both McGowan and Campbell would not have acted any differently if McGowan had not briefly represented Moore. Therefore, the court denied Moore's motion because Moore could not show an adverse effect on the outcome of his case.

Although couched in terms of prosecutorial misconduct, at best Moore has raised a conflict of interest question with regard to McGowan. While it may have been the wiser course for Campbell to retain new representation in this case, the evidence does not show an actual conflict. Further, although Moore

intimates that there was prosecutorial misconduct, he is unable to supply any proof of improper conduct. There is absolutely no evidence that the prosecutor was influenced by his knowledge of a potential conflict. In fact, it was only after the prosecutor had determined a course of action and decided to obtain Campbell's proffer that he discovered the potential conflict, while researching Campbell's state proceedings. There is no evidence that once he discovered the potential conflict, the prosecutor coerced the proffer or influenced McGowan's advice to Campbell. On the contrary, McGowan testified that he considered the issue and determined that there was no conflict. The prosecutor relied on McGowan's judgment. Since McGowan was the only party in possession of the facts relating to the substance of his representation, this reliance was reasonable.

Finally, neither Moore nor the majority have provided any case law or authority that would impose a duty upon the prosecutor to have acted differently in this case. On the question of prosecutorial misconduct both Moore and the majority focus solely on the issue of prejudice to Moore from any *potential* misconduct. Before there can be prejudice, however, there must be misconduct. Although the majority opinion leaves doubt, there is not even a hint of untoward behavior on the part of the prosecutor in bringing this case.

U.S. CONST. AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FED. R. EVID. 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.